92-1236

No._____

Supreme Court, U.S.
FILED
JAN 19 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

UNIT RIG INC., TEREX CORPORATION,
AND MRL ACQUISITION CORPORATION,

Petitioners,

v.

JOHN W. WHALEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Graydon Dean Luthey, Jr.
Counsel of Record
Frank M. Hagedorn
J. Patrick Cremin
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Age Discrimination in Employment Act permits a private discrimination action in a United States District Court where the plaintiff failed, as required by the Act and most circuits, to name the defendant as a respondent in the administrative charge the plaintiff filed with the Commission.

2. Whether the Age Discrimination in Employment Act permits a failure to hire claim in the United States District Court when the plaintiff failed, as required by the Act and most circuits, to assert failure to hire in the administrative charge the plaintiff filed with the Commission.

3. Whether the Age Discrimination in Employment Act permits a private discrimination action in a United States District Court where the defendant did not have an opportunity to settle the dispute through conciliation, conference and persuasion because the plaintiff failed to name the defendant as a respondent in the administrative charge filed with the Commission.

4. Whether a plaintiff, in order to state a claim for failure to hire under the Age Discrimination in Employment Act and in most circuits, must first apply for the position with the company which purchased the assets of the plaintiff's previous employer.

PARTIES TO THE PROCEEDING

Petitioners:

Unit Rig is an unincorporated division of Terex Corporation,

Terex Corporation is the parent corporation with the following subsidiaries:

Clark Material Handling Company; Fruehauf Trailer Corporation; Terex Equipment, Limited.; Unit Rig (Australia) Pty. Limited; and Unit Rig (Canada) Limited.

Unincorporated divisions of Terex Corporation are:

Koehring Cranes and Excavators, Northwest Engineering Company, Mark Industries, and Unit Rig.

MRL Acquisition Company has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

Respondent:

John W. Whalen

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTORY AND REGULATORY PROVISIONS 2

STATEMENT OF THE CASE 7

REASONS FOR GRANTING THE WRIT 11

I. The decision of the Tenth Circuit is contrary to the language of the ADEA and is in conflict with decisions of other circuits which hold that naming a defendant as a respondent in the administrative charge is a condition precedent to filing a lawsuit. 12

II. The decision of the Tenth Circuit is contrary to the language of the ADEA and is in conflict with decisions of other circuits which hold that asserting the claim sued upon in the administrative charge is a prerequisite to filing a lawsuit. 14

III. The decision of the Tenth Circuit is in conflict with decisions of other circuits and is contrary to the language of the ADEA and regulations mandated by Congress requiring that the parties have an opportunity to settle disputes through conciliation, conference and persuasion before commencing a civil action under the ADEA. 16

IV. The decision of the Tenth Circuit is in conflict with decisions of other circuits which hold that applying for a job is a prerequisite to filing an age discrimination claim for failure to hire. 19

CONCLUSION 21

APPENDIX A-1

TABLE OF AUTHORITIES

Pages

CASES

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 18

Aronsen v. Crown Zellerbach, 662 F.2d 584,
(9th Cir. 1981) cert. denied, 459 U.S. 1200 (1983) 12

Babrocky v. Jewel Food Co. & Retail Meat Cutters,
773 F.2d 857 (7th Cir. 1985) 14,18

Beverly v. Lone Star Lead Construction Corp.,
437 F.2d 1136 (5th Cir. 1971) 12,18

Chambers v. Wynne School District, 909 F.2d 1214
(8th Cir. 1990).....19,20

Edwards v. Kaiser Aluminum & Chemical Sales, Inc.,
515 F.2d 1195, 1200 n. 8 (5th Cir. 1975) 16

EEOC v. Prudential Federal Savings & Loan Association,
763 F.2d 1166 (10th Cir. 1985), cert. denied,
474 U.S. 946 (1985).....13,17

Evan v. Meadows Steel Products Inc., 579 F. Supp. 1391
(N.D. Ga. 1984) 13

Evans v. American Nurses Association, 657 F. Supp. 1277
(W.D. Mo. 1987).....14

Fowle v. C&C Cola, et al., 868 F.2d 59
(3rd Cir. 1989). 19,20

Gilmore v. Local 295, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 798 F. Supp. 1030 (S.D. N.Y. 1992) 13

Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985) 14

Haag v. Board of Education, 655 F. Supp. 1267 (N.D. Ill. 1987).....13

Harris v. First National Bank of Hutchinson, Kansas, 680 F. Supp. 1489 (D. Kan. 1987).....13

Jacobson v. Pitman-Moore, Inc., 624 F. Supp. 937, 943 (D. Minn. 1978) 16

Jones v. Singer Career Systems, 584 F. Supp. 1253 (E.D. Ark. 1984) 13

Keyse v. Cal-Tex Oil Corp., 590 F.2d 45 (2d Cir. 1978). 16

Lawson v. Burlington Industries, Inc., 683 F.2d 862 (4th Cir. 1982).....15,19

Loe v. Heckler, 768 F.2d 409 (D.C. Cir. 1985) 14

Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979).....12

Looney v. Commercial Union Assurance Companies, 428 F. Supp. 533 (E.D. Mich. 1977).....15

Marshall v. Sun Oil Co., 592 F.2d 563, 565 (10th Cir. 1979), cert. denied, 444 U.S. 826, 100 S. Ct. 49, 62 L.Ed.2d 33 (1979).....14,17

McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973).....19

McGee v. Grand Rapids Press, 486 F. Supp. 584 (W.D. Mich. 1980), aff'd 663 F.2d 1072 (6th Cir. 1981) 15

Michelson v. Exxon Research and Engineering Company, 808 F.2d 1005 (3rd Cir. 1983) 12,19

Mickel v. South Carolina State Employment Service, 377 F.2d 239 (4th Cir. 1967), cert. denied, 389 U.S. 877 (1967) 12,17

Perkins v. Silverstein, 939 F.2d 463, 471 (7th Cir. 1991) 12

Quinn v. Bowmar Publishing Company, 445 F. Supp. 780 (D.C. Md. 1978) 13

Reilly v. Friedman's Express, Inc., 556 F. Supp. 618, 623 (M.D. Pa. 1983) 19,20

Romain v. Kurek, 836 F.2d 241 (6th Cir. 1987) 12,18

Rush v. McDonald's Corporation, 966 F.2d 1104 (7th Cir. 1992) 15,19

Seedman v. Alexanders, Inc., 683 F. Supp. 924 (S.D. N.Y. 1987) 13

Smith v. Century Insurance, 674 F. Supp. 1459 (N.D. Ga. 1987) 13

Stalcop v. Kaiser Foundation Hospitals, 820 F.2d 1044 (9th Cir. 1987), cert. denied, 108 S. Ct. 504 (1987) 15

Steffan v. Meridian Life Insurance Company,
859 F.2d 539 (7th Cir. 1988),
cert. denied, 109 S. Ct. 3191 (1989) 15

Terrell v. U.S. Pipe & Foundry Co., 644 F.2d 1112
(5th Cir. 1981).....12,18

Trevors v. Corning Glass Works, 76 F.R.D. 431 (S.D.
N.Y. 1977) 13

Wanger v. G. A. Gray Company, 872 F.2d 142
(6th Cir. 1989).....19,20

Whalen v. Unit Rig, Inc. Terex Corporation,
and MRL Acquisition Corporation,
974 F.2d 1248 (10th Cir. 1992) 1

White v. N. Louisiana Legal Assistance Corporation,
468 F. Supp. 1347 (W.D. La. 1979).....13

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 974 F.2d 1248 (10th Cir. 1992). It affirms the judgment of the United States District Court for the Northern District of Oklahoma entered on jury verdict. A copy of that opinion is attached as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on September 10, 1992. On September 24, 1992, Petitioner timely filed a Petition for Rehearing. The Court below entered an Order denying the Petition for Rehearing on October 20, 1992. This Petition for Writ of Certiorari is filed within ninety days of that date. The jurisdiction of this Court to review the Judgment on Petition for Writ of Certiorari rests upon 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Age Discrimination in Employment Act ("ADEA")
29 U.S.C.A § 621-634

29 U.S.C.A. § 623. **Prohibition of age discrimination**

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C.A. § 626(d)

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a

charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed --

> (1) within 180 days after the alleged unlawful practice occurred; or
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
> Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

29 C.F.R. § 1626.6

Form of charge.

A charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s). Charges received in person or by telephone shall be reduced to writing.

29 C.F.R. § 1626.8

Contents of charge; amendment of charge.

(a) In addition to the requirements of § 1626.6, each charge should contain the following:

(1) The full name, address and telephone number of the person making the charge;

(2) The full name and address of the person against whom the charge is made;

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices;

(4) If known, the approximate number of employees of the prospective defendant employer or members of the prospective defendant labor organization.

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge either a written statement or information reduced to writing by the Commission that conforms to the requirements of § 1626.6.

(c) A charge may be amended to clarify or amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not again be referred to the appropriate State agency.

42 U.S.C.A. § 2000e-5. **Enforcement provisions**

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment

agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall

be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

STATEMENT OF THE CASE

INTRODUCTION

Petitioners request the Court to review a published opinion of the Tenth Circuit Court of Appeals. Under this decision an employer in the Tenth Circuit can face federal litigation under the ADEA on a claimed wrongful act which (1) was never raised at the administrative level, (2) against an employer never charged at the administrative level and (3) never given the opportunity for conciliation (4) for refusal to hire an individual who never expressed his desire for the job over which he later sues. In the Third, Fourth, Fifth, Sixth, Seventh, Eighth or Ninth Circuits the same employer, under the same facts, would face no such litigation.

Petitioners contend that the documents Whalen filed with the Oklahoma Human Rights Commission ("OHRC") were insufficient to constitute an administrative charge against them and thus Whalen failed to meet a condition precedent to the filing of the suit. Whalen's OHRC charge (1) did not name the Petitioners as Respondents; (2) did not raise a failure to hire claim against Petitioners; (3) Petitioners never received notice of the age discrimination charge; and (4) Petitioners had no opportunity for conciliation.

SUMMARY OF FACTS

This suit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., arises from John W. Whalen's ("Whalen") termination from employment by Unit Rig and Equipment Company ("URE"), on December 30, 1988. The basic facts are as follows:

Whalen, age sixty-three, who had been employed by URE as controller, was terminated when Terex Corporation ("Terex"), acting through MRL Acquisition Corporation ("MRL"), acquired the assets of URE and formed Unit Rig ("Unit Rig"), an unincorporated division of Terex. Terex

followed its established procedure of placing its own people in the top financial positions and transferred another financial employee from within Terex, Bill Schein, age thirty-two, who was given the title of controller.

Whalen never applied for any position with Unit Rig, nor did he ever inform anyone with Unit Rig or Terex that he had an interest in the controller position or other permanent employment with Unit Rig. Whalen accepted a temporary assignment for a 60 day period with the new company. When offered this assignment Whalen stated only, "I need the work."

On October 20, 1988, Whalen, with the assistance of his attorney, prepared and filed with the Oklahoma Human Rights Commission ("OHRC") Age Complaint Intake Questionnaires, which included the Age Complaint Affidavit and Layoff Form. Whalen stated that he was discharged from employment with URE on July 14, 1988. In the Age Complaint Affidavit included in the Age Complaint Intake Questionnaires, Whalen stated, inter alia, that his complaint was being filed against Unit Rig and Equipment Co., MRL Acquisition Corp., Terex Corp. and Unit Rig, Inc., for the reason that these entities acted in concert to unlawfully terminate his employment on the basis of his age. He did not state in the Age Complaint Intake Questionnaires that he was complaining because he was not hired by Unit Rig, Terex or MRL.

On December 30, 1988, prior to the completion of the administrative procedures, Whalen filed his action in the United States District Court for the Northern District of Oklahoma against URE, Unit Rig, Terex, and MRL. In Count I, he alleged that he was discharged from his employment with URE on July 14, 1988, because of his age, in violation of 29 U.S.C. § 623(a). In Count II, he alleged that MRL as the agent of Terex, refused to hire him as controller for Unit Rig Inc. because of his age, in violation of the ADEA.

On January 9, 1989, after filing this action, Whalen,

with the help of his lawyer, filed an Age Official Complaint Form, which was his formal charge against URE only, alleging age discrimination because of his discharge as controller of URE. Nowhere on any document completed by Whalen did he state that he was complaining because he was not hired by Unit Rig, Terex or MRL.

On March 31, 1989, the Equal Employment Opportunity Commission ("EEOC") mailed a notice of charge of discrimination to Joe B. Freeman of URE stating that Whalen had filed a charge against URE for age discrimination and requesting a response from URE. No notice of Whalen's charge was given to Unit Rig, Terex or MRL.

On April 17, 1989 the EEOC informed Whalen and Freeman that it had terminated its investigation because Whalen had filed a lawsuit.

On May 22, 1989, Whalen and URE filed a joint stipulation dismissing with prejudice Count I of the Complaint and the counterclaim. Thus, only Whalen's action for failure to hire against Unit Rig, Terex and MRL continued.

Unit Rig, Terex and MRL filed a Motion for Summary Judgment in which they raised the administrative filing issues which was denied by the trial court in its Order of April 17, 1990 (attached as Appendix C).

During the jury trial, on motions for directed verdict and for Judgment Notwithstanding the Verdict or in the Alternative, a Motion for New Trial, Unit Rig, Terex and MRL raised the administrative filing issues, which motions were overruled. The court entered judgment in favor of Whalen on December 13, 1990, (attached as Appendix D).

The appellate court affirmed the trial court's decision. See Opinion of United States Court of Appeals for the Tenth Circuit, John W. Whalen v. Unit Rig, Inc. Terex Corporation, and MRL Acquisition Corporation, No. 91-5069, September 10, 1992 (attached as Appendix A); and Order on Petition for Rehearing, John W. Whalen v. Unit Rig, Inc. Terex

Corporation, and MRL Acquisition Corporation, No. 91-5069 (10th Cir., October 20, 1992) (attached as Appendix B).

Appellant's Motion for Stay of Mandate Pending Petition for Writ of Certiorari was denied on November 5, 1992, and mandate was issued on that date.

Existence of Jurisdiction Below

The United States District Court for the Northern District of Oklahoma exercised jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1331.

Jurisdiction of the United States Court of Appeals for the Tenth Circuit is predicated upon 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The decision of the Tenth Circuit should be reviewed because the conflict between the circuits presents two clear choices for this Court with respect to the law on the administrative filing issues addressed by the Tenth Circuit in Whalen. The Court can adopt the Tenth Circuit resolution of the issues, which will foster litigation and discourage alternative means of dispute resolution, or it can adopt the majority view which will quell litigation by requiring alternative means of dispute resolution as mandated by Congress and the ADEA, which is much less time and resource-consuming on an overwhelmed and understaffed judiciary and much less expensive to the litigant employees and employers. The majority view does not place a heavy burden on plaintiffs and their lawyers. It merely requires them to follow the clear conditions precedent to the filing of an action in the United States District Court pursuant to the ADEA, to wit, a valid administrative charge, which includes the claim on which the district court action is based and the named respondents on whom the action is brought, so as to provide notice and an opportunity for conciliation as mandated by Congress and the ADEA.

As demonstrated by the number of cases cited in the circuit and district courts in this petition, there is a history of reoccurrence in this area of the law. The need for review of the Tenth Circuit decision is not just to resolve the private dispute between the parties to this action, rather, it is to clearly set the standard for resolving disputes between employees and employers in the lower courts throughout the United States.

I. The decision of the Tenth Circuit is contrary to the language of the ADEA and is in conflict with decisions of other circuits which hold that naming a defendant as a respondent in the administrative charge is a condition precedent to filing a lawsuit.

Based on the facts in the instant case, under decisions of the U.S. Courts of Appeal for the Third, Fourth, Fifth, Sixth and Seventh Circuits, Whalen's charge of age discrimination would not be sufficient to meet the conditions precedent to commence an action in federal court against Unit Rig, Terex and MRL. Michelson v. Exxon Research and Engineering Company, 808 F.2d 1005 (3rd Cir. 1983); Mickel v. South Carolina State Employment Service, 377 F.2d 239 (4th Cir. 1967), cert. denied, 389 U.S. 877 (1967); Terrell v. U.S. Pipe & Foundry Co., 644 F.2d 1112 (5th Cir. 1981); Beverly v. Lone Star Lead Construction Corp., 437 F.2d 1136 (5th Cir. 1971); and Romain v. Kurek, 836 F.2d 241 (6th Cir. 1987). Also, see Perkins v. Silverstein, 939 F.2d 463, 471 (7th Cir. 1991), where the court held "that a party not named in the EEOC charge cannot be sued under Title VII."[1]

Federal courts in other circuits have consistently ruled that where the Plaintiff failed to name a party as the respondent in Plaintiff's EEOC charge and the party was

---

[1] Under the EEOC Procedures the charge refers to the Age Official Complaint Form in which the charge is stated and the respondent is named. The charge is not part of the Age Complaint Intake Questionnaire. Id. at 470. The legal rules governing ADEA cases, including the administrative filing requirements, are virtually identical to those of the Title VII. The framework and procedure by which a plaintiff establishes his or her right to relief in a Title VII proceeding are applicable to ADEA claims, Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979). Courts often rely on the provisions of Title VII and cases construing it to address age discrimination claims. Aronsen v. Crown Zellerbach, 662 F.2d 584, (9th Cir. 1981) cert. denied, 459 U.S. 1200 (1983).

given no notice of the charge filed against it, and was given no opportunity to participate in an EEOC conciliation procedure, the party cannot be named in a subsequent civil suit. Jones v. Singer Career Systems, 584 F. Supp. 1253 (E.D. Ark. 1984); White v. N. Louisiana Legal Assistance Corporation, 468 F. Supp. 1347 (W.D. La. 1979); Evan v. Meadows Steel Products Inc., 579 F. Supp. 1391 (N.D. Ga. 1984); Seedman v. Alexanders, Inc., 683 F. Supp. 924 (S.D. N.Y. 1987); Smith v. Century Insurance, 674 F. Supp. 1459 (N.D. Ga. 1987). A party not named in an EEOC charge is not subject to suit in a private civil action for the same conduct complained of in the charge. Harris v. First National Bank of Hutchinson, Kansas, 680 F. Supp. 1489 (D. Kan. 1987); and Haag v. Board of Education, 655 F. Supp. 1267 (N.D. Ill. 1987).

The failure to name individual defendants as respondents is not a procedural technicality but a matter of substance because it fails to afford defendants the right to notice of a claim against them, Trevors v. Corning Glass Works, 76 F.R.D. (431 S.D. N.Y. 1977); and Quinn v. Bowmar Publishing Company, 445 F. Supp. 780 (D.C. Md. 1978). Also, see Gilmore v. Local 295, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 798 F. Supp. 1030 (S.D. N.Y. 1992), where the court ruled that absent any reference to a union in an employee's EEOC charge, the district court lacked jurisdiction over the employee's civil rights claims against the union.

Clearly, the decisions of a majority of courts hold that before a party may properly be sued under the ADEA, it must first be administratively charged. This requirement is to allow the EEOC to attempt to eliminate the alleged unlawful practice through informal methods of conciliation, conference and persuasion and to encourage the settlement of discrimination cases through voluntary compliance rather than litigation. EEOC v. Prudential Federal Savings & Loan Association, 763 F.2d 1166 (10th Cir. 1985), cert. denied,

474 U.S. 946 (1985); Marshall v. Sun Oil Co., 592 F.2d 563, 565 (10th Cir. 1979), cert. denied, 444 U.S. 826, 100 S. Ct. 49, 62 L.Ed.2d 33 (1979).

The opinion of the Tenth Circuit in Whalen, if let stand, will permit the filing of an action against a potential defendant who was not named as a respondent in the administrative charge, was not given notice of a valid charge or provided an opportunity for conciliation, which is in conflict with the decisions of other circuits. This is contrary to the intent of Congress and the clear language of the ADEA.

II. The decision of the Tenth Circuit is contrary to the language of the ADEA and is in conflict with decisions of other circuits which hold that asserting the claim sued upon in the administrative charge is a prerequisite to filing a lawsuit.

It is well settled that federal courts may only hear claims encompassed within the EEOC charge and like or related matters that might reasonably be expected to be subject to EEOC investigation growing out of the charge. Whalen could not pursue a claim against Petitioners for "failure to hire" because he did not make this allegation in his OHRC documents. An employee may not enlist the court's aid on claims never presented for agency [EEOC] consideration. Loe v. Heckler, 768 F.2d 409 (D.C. Cir. 1985); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985); Evans v. American Nurses Association, 657 F. Supp. 1277 (W.D. Mo. 1987). The scope of the subsequent judicial Complaint is limited to the scope of the EEOC or OHRC charge. In Babrocky v. Jewel Food Co. & Retail Meat Cutters, 773 F.2d 857 (7th Cir. 1985), the court noted that allowing a federal court complaint to encompass allegations outside the ambit of the predicate EEOC charge would

circumvent the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge, as surely as would an initial failure to file a timely EEOC charge.

Failure to properly identify the ADEA claim or to identify each individual ADEA claim in the notice to the EEOC has been held by numerous courts to be grounds for dismissing those complaints. See Steffan v. Meridian Life Insurance Company, 859 F.2d 539 (7th Cir. 1988), cert. denied, 109 S. Ct. 3191 (1989) (plaintiff barred from maintaining retaliatory discharge claim when the EEOC charge only mentioned age discrimination claim); Stalcop v. Kaiser Foundation Hospitals, 820 F.2d 1044 (9th Cir. 1987), cert. denied, 108 S. Ct. 504 (1987) (former employee's failure to use specific word "age" and "sex" in employment discrimination complaint filed with state agency precluded her action based on age and sex discrimination). In Lawson v. Burlington Industries, Inc., 683 F.2d 862 (4th Cir. 1982), the court upheld the dismissal of the failure to rehire claim because the EEOC charge of illegal lay off did not encompass the allegation of failure to recall.

In Rush v. McDonald's Corporation, 966 F.2d 1104 (7th Cir. 1992), where a discharged black employee's claim filed with EEOC alleged that she had been discharged because of her race, the court held that the charge was insufficient to permit a lawsuit based upon sexual harassment; McGee v. Grand Rapids Press, 486 F. Supp. 584 (W.D. Mich. 1980) (where the EEOC charge was limited to allegations of race discrimination and layoff. The court held that the federal district court was without jurisdiction to consider claims of discrimination in hiring or promotion even where the same employer is involved in both actions.), affirmed 663 F.2d 1072 (6th Cir. 1981); and Looney v. Commercial Union Assurance Companies, (where the court held that the employee's notice of intent to sue only included a claim of discriminatory discharge the court dismissed the "retaliation" and "terms and conditions" claims included in

the Complaint filed in the civil suit for failure to comply with the notice requirement of Section 626(d)).[2]

In order to insure uniform application of the ADEA throughout the United States with respect to the requirement that a valid "charge" must be asserted in the administrative proceeding against named respondents prior to commencing an action in the federal courts, the conflict in the circuit courts should be settled by this court.

III. The decision of the Tenth Circuit is in conflict with decisions of other circuits and is contrary to the language of the ADEA and regulations mandated by Congress requiring that the parties have an opportunity to settle disputes through conciliation, conference and persuasion before commencing a civil action under the ADEA.

The ADEA provides that a civil action may be commenced by an individual only after a charge alleging unlawful discrimination has been filed with the EEOC and further states that "upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by

---

[2] Whalen was represented by counsel throughout the administrative process and cannot now rightfully assert any claim for relief not raised in his attorney-drafted filings with the EEOC. See Keyse v. Cal-Tex Oil Corp., 590 F.2d 45 (2d Cir. 1978)(tolling of filing period "would be improper if appellant was represented by counsel . . . ."); Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 515 F.2d 1195, 1200 n. 8 (5th Cir. 1975)("[T]he very purpose of consulting an attorney is to ascertain what legal redress arises out of a factual situation encompassing a supposed wrong"); Jacobson v. Pitman-Moore, Inc., 624 F. Supp. 937, 943 (D. Minn. 1978)("The result of negating plaintiff's ADEA claim because of the failing of an attorney is no doubt harsh. Still, defendant is not responsible for attorney Johnson's conduct").

informal methods of conciliation, conference, and persuasion." (emphasis added), 29 U.S.C. § 626(d). The Regulations require that the "charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s)." 29 C.F.R. § 1626.6.

In Marshall v. Sun Oil Co. of Pa., 592 F.2d 563, 565 (10th Cir. 1979), the court states that "[t]he ADEA places primary emphasis on conciliation to resolve disputes," and further states as follows:

> The legislative history of the Act manifests the congressional intent that enforcement be effected wherever possible without resorting to formal litigation. The House Report states: It is intended that the responsibility for enforcement vested in the Secretary by section 7, be initially and exhaustively directed through informal methods of conciliation, conference, and persuasion and formal methods applied only in the ultimate sense. (Emphasis in original).

See EEOC v. Prudential Federal Savings & Loan Association, 763 F.2d 1166 (10th Cir. 1985), cert. denied, 474 U.S. 946 (1985).

In Mickel v. South Carolina State Employment Service, 377 F.2d 239, 241, (4th Cir. 1967), cert. denied 389 U.S. 877 (1967) the court stated that "Congress has provided that persons aggrieved by unlawful practices should first attempt to have the Commission settle the matter in an atmosphere of secrecy without resorting to the extreme measure of bringing a civil action in the congested federal courts." The court further states that "it seems clear from the language of the statute [42 U.S.C. § 2000e-5(b)] that a civil action could be brought against the respondent named in the charge filed with the Commission only after conciliation efforts had failed, or, in any event, after opportunity had been

afforded the Commission to make such efforts." (Emphasis in original).

The Fifth Circuit held in Beverly v. Lone Star Lead Construction Corp., 437 F.2d 1136 (5th Cir. 1971), that "[p]otential litigants are absolutely required to take a step which affords them at least an opportunity to reach a more amicable conciliation out of court," and that "[t]he complainant must comply with the minimum jurisdictional requirements necessary to allow the opportunity for conciliation to mature." (Emphasis in original).

The court in Romain v. Kurek, 836 F.2d 241, 245 (6th Cir. 1987), stated that "[t]wo goals are advanced by requiring a plaintiff to name the Title VII defendant in the charge filed with the EEOC. First, the charge serves to notify the defendant of the discrimination claim alleged against him," and that "[b]y receiving notice of the claim, a defendant is able to preserve evidence that could be useful in his defense." The court further stated that "[b]y naming the charged party and bringing him before the EEOC, that person is able to participate in conciliation efforts directed at securing voluntary compliance with the Act," and finally, that "[c]onciliation is a primary goal of Title VII and provides an avenue for compliance without the resort to the expense and inconvenience of litigation." See also, Terrell v. U.S. Pipe & Foundry Co., 644 F.2d 1112, 1122 ("Only parties previously identified as respondents in charges filed with the EEOC are subject to subsequent liability under Title VII.").

In Babrocky v. Jewel Food Co. & Retail Meat Cutters, 773 F.2d 857, 863 the court stated that "[a] plaintiff must file a timely charge with the EEOC encompassing the acts complained of as a prerequisite to filing suit in a federal court." (citing Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)). The court further noted that "[t]imely filing affords the EEOC 'an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party [is] permitted to file a lawsuit.'" Id. (quoting Alexander at 44).

In order to comply with the provisions of the Act requiring the elimination of "any alleged unlawful practice by informal methods of conciliation, conference, and persuasion," the courts must require that a party seeking relief under the ADEA file a charge embracing the claims included in his civil action complaint and that the persons named in the complaint be named in the charge filed with the EEOC. See Michelson v. Exxon Research and Engineering Company, 808 F.2d 1005 (3rd Cir. 1983); Lawson v. Burlington Industries, Inc., 683 F.2d 862 (4th Cir. 1982) ("Illegal layoff - the charge which appeared in the EEOC notice - does not encompass an allegation of illegal failure to rehire"); Rush v. McDonald's Corporation, 966 F.2d 1104 (7th Cir. 1992).

IV. The decision of the Tenth Circuit is in conflict with decisions of other circuits which hold that applying for a job is a prerequisite to filing an age discrimination claim for failure to hire.

Whalen failed to make a case of age discrimination for failure to hire because he never applied for, or otherwise made known his desire for, the position. The decision of the Tenth Circuit on this issue is in conflict with decisions of the Third, Sixth and Eighth Circuit Courts of Appeals.

In an age discrimination case involving failure to hire, a Plaintiff must establish that he applied for the job. McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973); Wanger v. G. A. Gray Company, 872 F.2d 142 (6th Cir. 1989); Fowle v. C&C Cola, et al., 868 F.2d 59 (3rd Cir. 1989); Chambers v. Wynne School District, 909 F.2d 1214 (8th Cir. 1990); Reilly v. Friedman's Express, Inc., 556 F. Supp. 618, 623 (M.D. Pa. 1983). Whalen never applied for any position with Unit Rig, Terex or MRL.

The ADEA does not require a plaintiff to submit a formal written application in every case, but it requires the plaintiff to manifest in some objective manner his desire to

be employed by defendant. In this case, Whalen did nothing.

In Wanger v. G. A. Gray Company, 872 F.2d 142 (6th Cir. 1989), the Court of Appeals held that a 51 year-old employee's failure to formally apply for an available position with his former employer after he had been terminated as part of a reduction in force precluded his Age Discrimination in Employment Act claim. The court stated, "With limited exceptions, one cannot establish that he was subject to an adverse hiring decision unless he makes his desire for the position known to the employer." See Chambers v. Wynne School District, 909 F.2d 1214 (8th Cir. 1990) (The Court of Appeals held that plaintiff did not establish a prima facie case of discrimination with regard to openings for which she never formally applied); Fowle v. C&C Cola, et al., 868 F.2d 59 (3rd Cir. 1989) (The court held that plaintiff's failure to apply for either of the open positions, or to otherwise indicate his desire for the position near the time they were filled, precluded him from complaining of the failure to hire.); and Reilly v. Friedman's Express, Inc., 556 F. Supp. 618, 623 (M.D. Pa. 1983) ("The requirement that an age discrimination plaintiff apply for the job is grounded in common sense. For if an application were not necessary, then nearly every decision to hire or promote would be subject to challenge.")

Whalen's failure to apply for a position with the company that purchased the assets of his former employer is in many circuits preclusive of his right to recover under the ADEA. The Third, Sixth and Eighth Circuits require that a person who complains of failure to hire must affirmatively apply for or make it known that he desires employment in the available position. The decision of the Tenth Circuit should be reviewed because it sets a standard for bringing a failure to hire suit which conflicts with other circuits.

CONCLUSION

The issues presented by this case are of great and recurring significance in the administration of claims brought pursuant to the Age Discrimination in Employment Act. The important nature of these issues has been recognized by numerous courts. The questions concerning administrative procedure and conditions precedent to filing which are involved here, along with the prejudicial effect of the decision below, if unreversed, make this case a particularly appropriate one for the exercise of this Court's discretionary jurisdiction.

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Graydon Dean Luthey, Jr.
Frank M. Hagedorn
J. Patrick Cremin
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

ATTORNEYS FOR PETITIONERS

APPENDIX

TABLE OF CONTENTS

Appendix A — Opinion of United States Court of Appeals for the Tenth Circuit, John W. Whalen v. Unit Rig, Inc. Terex Corporation, and MRL Acquisition Corporation, No. 91-5069, September 10, 1992 ..... A-1

Appendix B — Order on Petition for Rehearing, John W. Whalen v. Unit Rig, Inc. Terex Corporation, and MRL Acquisition Corporation, No. 91-5069 (10th Cir., October 20, 1992) A-12

Appendix C — Order denying Defendant's Motion for Summary Judgment, John W. Whalen v. Unit Rig, Inc. Terex Corporation, and MRL Acquisition Corporation, Case No. 88-C-1667-B (N.D. Okla., April 17, 1990) A-14

Appendix D — Judgment in John W. Whalen v. Unit Rig, Inc. Terex Corporation, and MRL Acquisition Corporation, Case No. 88-C-1667-B (N.D. Okla., Dec. 13, 1990) A-23

APPENDIX - A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JOHN W. WHALEN,	)	
Plaintiff - Appellee,	)	
v	)	No. 91-5069
UNIT RIG, INC., a Delaware Corporation; TEREX CORPORATION, a Delaware Corporation; MRL ACQUISITION CORPORATION, a Delaware Corporation,	)	
Defendants - Appellants.	)	

APPEAL from the UNITED STATES DISTRICT COURT
for the NORTHERN DISTRICT OF OKLAHOMA
(D.C. 88-C-1667-B)

J. Patrick Cremin of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C. (with Frank M. Hagedorn on the briefs) of Tulsa, Oklahoma, for Appellants.

J. Douglas Mann of Rosenstein, Fist & Ringold (with Eric P. Nelson on the briefs) of Tulsa, Oklahoma, for Appellee.

Before McKAY, Chief Judge, McWILLIAMS, Circuit Judge, and EISELE, District Judge. [1]

McKAY, Chief Judge.

[1]Honorable G. Thomas Eisele, Senior District Judge, United States District Court for the Eastern District of Arkansas, sitting by designation.

This age discrimination lawsuit arises from actions taken during a corporate acquisition. Plaintiff won a jury verdict and judgment for damages, attorney's fees, costs and expenses. Defendant companies appeal, arguing that plaintiff failed to prove his case and that the district court made various errors at trial. We affirm.

Unit Rig and Equipment Company ("URE"), after several years of financial troubles, was sold in 1988 to Terex Corporation ("Terex") with the assistance of MRL Acquisition Corporation ("MRL"). The newly acquired entity was named Unit Rig, Inc. ("URI"). As part of the acquisition process, all URE employees (approximately 500 people) were discharged on July 14, 1988, and all but forty-six were hired by URI on the following day without a formal job application process.

Plaintiff John Whalen was among the forty-six employees not hired by URI. He had been employed at URE since 1977 and had held the job of Controller for three years. He was sixty-three years old at the time of his discharge.

Frank Hill became president of URI when the acquisition was completed. He immediately merged the duties of Controller and Director of Finance, naming a Terex employee he knew to fill the new position of Vice President of Finance. This job merger lasted only two weeks, however, before the Vice President of Finance named another Terex employee as Controller. This new Controller was twenty-nine years old.

Shortly after Mr. Whalen heard that a new Controller had been hired, he filed documents with the Oklahoma Human Rights Commission ("OHRC") alleging that he had been the victim of age discrimination.[2] Mr. Whalen filed this lawsuit pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (1982) ("ADEA"), after the sixty-day

---

[2]The OHRC is authorized by the Equal Employment Opportunity Commission ("EEOC") to process charges of age discrimination in employment.

deferral period mandated by ADEA had expired.[3]

Evidence was introduced at trial that a Terex vice president, Larry Skaff, had requested lists of URE employees in declining order of age and that these lists were delivered to Mr. Skaff and Mr. Hill at the time these two men made employment decisions regarding URI. One witness testified to hearing Mr. Hill describe his intent to hire a "young controller" during the acquisition process.

Defendants filed motions at various stages of litigation to challenge the sufficiency of the evidence to support a verdict of age discrimination. The companies now appeal from denial of these motions. Defendants also challenge the district court's decision to admit into evidence the lists of URE employees allegedly prepared at Mr. Skaff's request. Defendants further argue that the district court erred by allowing Mr. Whalen to dismiss his claim of willful age discrimination while the jury deliberated, and, finally, they raise various objections to the award of attorney's fees, costs and expenses.

As a preliminary matter, Mr. Whalen argues that the district court's denial of defendants' Notion for Summary Judgment is now moot and cannot be raised on appeal. He also argues that some issues raised in that motion were not preserved for appeal because they were not raised in defendants' Motion for Directed Verdict. This court has held that denial of a motion for summary judgment is not appealable. Boyles Galvanizing & Plating Co. v. Hartford Accident & Indem. Co., 372 F.2d 310, 312 (lOth Cir. 1967); cf. Grubb v. FDIC, 868 F.2d 1151, 1160 (lOth Cir. 1989) (issue of standing, first raised in summary judgment motion, could be addressed on appeal although summary judgment was denied).

Other circuit courts have recently adopted a rule that denial of summary judgment is not properly reviewable on an appeal from a final judgment entered after trial. Jarrett v. Epperly, 896 F.2d 1013, 1016 (6th Cir. 1990); Holley v.

---

[3]URE was dismissed from the suit prior to trial by joint stipulation.

Northrop Worldwide Aircraft Serv., 835 F.2d 1375, 1377-78 (llth Cir. 1988); Locricchio v. Legal Services Corp., 833 F.2d 1352, 1358-59 (9th Cir. 1987); Senza-Gel Corp. v. Seiffhart, 803 F.2d 661, 669 (Fed. Cir. 1986); Glaros v. H. H. Robertson Co., 797 F.2d 1564, 1573 (Fed. Cir. 1986), cert. dismissed, 479 U.S. 1072 (1987). As the Federal Circuit explained, a denial of summary judgment is not a judgment, but "merely a judge's determination that genuine issues of material fact exist." Glaros, 797 F.2d at 1573 (citing Switzerland Cheese Ass'n. Inc. v. E. Horne's Mkt., Inc., 385 U.S. 23, 25 (1966) (denial of summary judgment "is strictly a pretrial order that decides only one thing--that the case should go to trial"). The Ninth Circuit has elaborated on the injustice-of "depriv[ing] a party of a jury verdict after the evidence was fully presented, on the basis of an appellate court's review of whether the pleadings and affidavits at the time of the summary judgment motion demonstrated the need for a trial." Locricchio, 833 F.2d at 1359.[4]

We agree with the Eleventh Circuit that "[s]ummary judgment was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal." Holley, 835 F.2d at 1377-78. We now hold that even if summary judgment was erroneously denied, the proper redress would not be through appeal of that denial but through subsequent motions for judgment as a matter of law ("JAMOL") and appellate review of those motions if they were denied.[5]

Defendants challenged the legal sufficiency of the documents Mr. Whalen filed with the OHRC in their Notion for Summary Judgment, claiming that the documents did not

---

[4]We have found no case in which an appellate court overturned a jury verdict based on erroneous denial of summary judgment.

[5]This holding is consistent with the analysis of Grubb v. FDIC, 868 F.2d 1151 (10th Cir. 1989), where the issue of standing was examined on appeal from a final judgment after a full trial even though the moving party had been denied summary judgment on the matter and had not raised it in later motions for JAMOL. A challenge to standing, which is a jurisdictional issue, may be raised at any time. See Allen v. Wright, 468 U.S. 737, 750-51 (1984); Fed. R. Civ. P. 12(h)(3).

constitute a proper charge within statutory requirements. Summary judgment was denied. Defendants subsequently made an oral Motion for Directed Verdict and explicitly declined to revisit the issue of the OHRC documents.[6] This court has held that "[o]nly questions raised in a prior motion for directed verdict may be pursued in a motion for judgment notwithstanding the verdict. Dow Chem. Corp. v. Weevil-Cide Co., 897 F.2d 481, 486 (lOth Cir. 1990) (citation omitted). Defendants' decision not to address the issue in the Motion for Directed Verdict thus barred them from raising it in subsequent motions JAMOL. Because the issue was not properly raised below, we do not consider it on appeal. Farmers Ins. Co. v. Hubbard, 869 F.2d 565, 570 (lOth Cir. 1989). We now address other issues that were properly raised and preserved for appeal.

Defendants argue in their motions for directed verdict and judgment notwithstanding the verdict ("j.n.o.v.") that Mr. Whalen's case fails because he did not prove that he applied for a job with URI. Error in denying a motion j.n.o.v. will only be found if the evidence conclusively favors the moving party and is susceptible to no reasonable inferences that would sustain the non-moving party's position. Lucas v. Dover Corp., 857 F.2d 1397, 1400 (lOth Cir. 1988). In reviewing the district court's action, this court cannot assess credibility of witnesses or substitute its judgment for that of the jury. Id. The same standard of review applies to a motion for directed verdict. Zimmerman v. First Fed. Sav. & Loan Ass'n, 848 F.2d 1047, 1051 (lOth Cir. 1988) (citation omitted).

Employment discrimination law does not require that a plaintiff formally apply for the job in question. Rather, the law requires either that the employer be on specific notice

---

[6]Defendants' counsel explained to the district court in his oral Motion for Directed Verdict that "I'm not moving for a directed verdict on the grounds that his [OHRC] complaint is inadequate. I've already been through that field with you before on a motion for summary judgment." (Appellants' Appendix at 580.)

that the plaintiff seeks employment or, where informal hiring procedures are used, that the plaintiff be in the group of people who might reasonably be interested in the particular job. Grant v. Bethlehem Steel, 635 F.2d 1007, 1017 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981); Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1133 (llth Cir. 1984).

After thorough review of the record, we conclude that the evidence here does not conclusively favor defendants. Mr. Hill testified that no formal employment application procedures were followed. In addition, Mr. Whalen testified that he informed Mr. Skaff when he left his job as Controller that he needed work. A jury could reasonably infer from this evidence that even without a formal job application, Terex officials were on specific notice that Mr. Whalen was interested in the job of Controller. The jury could also have found that as the recently discharged Controller and the last person to hold that job, Mr. Whalen would certainly have been in the group of people who might reasonably be interested in the job when defendants filled it within two weeks of his departure. The jurors apparently found Mr. Whalen credible, and we cannot substitute our judgment for theirs. We therefore affirm the district court's denial of defendants' motions for directed verdict and for j.n.o.v. based on this claim.

Defendants next contend that Mr. Whalen failed to prove that age was a determining factor in defendants' actions and that their proffered reasons for the actions were pretextual. The plaintiff in an ADEA case has the burden of establishing that age was a determining factor in the employer's actions. EEOC v. Sperry Corp., 852 F.2d 503, 507 (lOth Cir. 1988). After the plaintiff has established the prima facie case, the burden shifts to the defendant to show that a legitimate, nondiscriminatory reason motivated the challenged decision. Id. The plaintiff may then rebut the defendant's case by showing that the proffered justification is a pretext. Id. In considering defendants' challenge to the district court's

denial of the motions for directed verdict and for j.n.o.v., we examine the evidence and the district court's decision under the standard of review described earlier, noting that "[t]he plaintiff retains throughout the ultimate burden of proving that age was a determining factor in the challenged decision." Lucas v. Dover Corp., 857 F.2d at 1401.

Defendants argued at trial that Terex officials wanted Terex employees in the top financial positions at URI and that they originally planned to consolidate positions to eliminate the job of Controller. As described earlier, Mr. Whalen introduced evidence to challenge these claims of nondiscriminatory motivation. A witness for Mr. Whalen testified that Mr. Skaff requested employee lists in declining order of age at the time Mr. Skaff and Mr. Hill made employment decisions during the acquisition. The witness testified that he produced and delivered the lists to Mr. Skaff and Mr. Hill at this time. Undisputed evidence showed that a twenty-nine-year-old Terex employee was hired as Controller approximately two weeks after Mr. Whalen's discharge and the purported elimination of that job. Finally, a witness for Mr. Whalen testified to hearing Mr. Hill comment that he would hire a "young controller." All of this evidence is susceptible to the reasonable inference that Mr. Whalen's age was a determining factor in defendants' actions toward him and that defendants' proffered explanations were pretextual. The jury apparently made this inference, and we affirm the district court's decision to leave the verdict undisturbed.

Defendants argue that the district court erred by allowing into evidence the URE employee lists offered by Mr. Whalen. Defendants specifically claim that the lists were not relevant to issues at trial and that they caused prejudice to defendants and confused the jurors. We review the district court's decisions under Fed. R. Evid. 401 and 403 for abuse of discretion. United States v. Alexander, 849 F.2d 1293, 1301 (lOth Cir. 1988) (Fed. R. Evid. 401); Spulak v. K Mart Corp., 894 F.2d 1150, 1156 (lOth Cir. 1990) (Fed. R. Evid. 403).

Mr. Whalen presented testimony that the lists of employees in declining order of age were prepared at the request of Mr. Skaff for Mr. Hill, were delivered to both men, and could have been consulted in employment decisions regarding Mr. Whalen. This testimony laid an adequate foundation for the district court's determination that the lists were relevant to the issue of age discrimination. We affirm the district court's determination of relevance.

Defendants argued at trial that the lists were not used in making employment decisions and that jurors would be confused and defendants prejudiced by admission of the lists into evidence. Resolving the factual dispute over whether the lists were used for employment decisions would properly be a matter for the jury. We hold that the district court did not abuse its discretion in finding that the lists would neither confuse the jury nor unfairly prejudice defendants on this matter.

Defendants argue that the district court erred when it allowed Mr. Whalen to dismiss his claim that defendants' age discrimination was willful. The dismissal came after the case had been submitted to the jury and after the parties were advised that the jury could not agree as to willfulness.

The decision to dismiss a cause of action under Fed. R. Civ. P. 41 is left to the discretion of the trial court and can be reversed only upon abuse of that discretion. LeCompte v. Mr. Chip Inc., 528 F.2d 601, 604 (5th Cir. 1976); Standard Indus. Inc. v. Mobil Oil Corp., 475 F.2d 220, 232 (lOth Cir.), cert. denied, 414 U.S. 829 (1973). When deciding whether to allow dismissal, the trial court should consider whether the non-moving party will suffer legal prejudice due to dismissal. LeCompte, 528 F.2d at 604.

In the case before us, the only prejudice defendants claim from the dismissal is loss of bargaining power with Mr. Whalen regarding other claims in the lawsuit. Even if Mr. Whalen did gain some tactical advantage from dismissing the claim late in the proceedings, the detriment arguably resulting for defendants would not have reached the level of

legal prejudice that the district court is required to consider in granting the motion to dismiss a claim. LeCompte, 528 F.2d at 604 (gain in tactical advantage not a bar to dismissal) (citation omitted). We hold that allowing Mr. Whalen to dismiss his willfulness claim at this stage was not an abuse of the district court's discretion.

Defendants appeal from denial of their Motion for New Trial, claiming that the verdict was against the law and the weight of the evidence.[7] We review the district court's decision for abuse of discretion. Richardson v. City of Albuquerque, 857 F.2d 727, 730 (lOth Cir. 1988). After thorough review of the record and for reasons cited earlier in this opinion, we conclude that the verdict was neither against the law nor against the weight of the evidence. Finding no abuse of discretion, we affirm the district court's denial of the motion.

Defendants contend that the district court erred in its award of attorney's fees, costs and expenses. This is a matter clearly within the district court's discretion. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Spulak v. K Mart Corp., 894 F.2d 1150, 1159-60 (lOth Cir. 1990).

Defendants first object to Mr. Whalen's recovering attorney's fees incurred during the administrative process preceding litigation. When this court addressed a similar issue under Title VII, our analysis focused on whether the administrative process was a prerequisite to court action. Manders v. Oklahoma ex rel. Dept. of Mental Health, 875 F.2d 263, 266-67 (lOth Cir. 1989) (citing New York Gaslight Club. Inc. v. Carey, 447 U.S. 54 (1980)). We now hold that because ADEA requires private plaintiffs to seek an administrative remedy prior to bringing suit, a fee award under ADEA may properly include fees for time spent on the administrative proceedings. See Reichman v. Bonsignore. Brignati & Mazzotta P.C., 818 F.2d 278, 282-83 (2d Cir.

---

[7]Defendants also reiterate their claim regarding admissibility of the employee lists. Having affirmed the district court's decision on this matter, we do not consider the claim in the Motion for New Trial.

1987) (congressional intent supports fee award for administrative proceedings under ADEA). Thus we affirm the district court's award in this regard.

Defendants also challenge the award of attorney's fees for time spent pursuing actions against URE that settled out of court. The Supreme Court has instructed that a fee award should be determined by examining "the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." Hensley, 461 U.S. at 435; see also Ramos v. Lamm, 713 F.2d 546, 556 (lOth Cir. 1983). "Reasonably expended" hours would not include time spent on claims "unrelated" to those on which the plaintiff prevails. Hensley at 434-35; Ramos at 556. The Hensley court held that a plaintiff cannot receive fees for time spent on "distinctly different claims for relief that are based on different facts and legal theories" and on which the plaintiff does not succeed. Hensley at 434-35. In the current case, Mr. Whalen's claims against all original defendants involved the same facts and legal theories. Because of the corporate acquisition in progress when Mr. Whalen was discharged, his claim against URE was substantially interrelated with his successful claims against the other defendants. We find no abuse of discretion in the district court's award of attorney fees for time spent on claims against URE that were settled before trial.

Defendants raise a similar objection to the award of attorney's fees for time spent litigating the willfulness claim which was dismissed on Mr. Whalen's motion. This argument falls squarely within the Hensley rationale as described above. The willfulness claim was based on the same core of facts and legal theories as Mr. Whalen's other claims. This court has allowed a fully compensatory fee where claims for relief were based on a common core of facts and the plaintiff obtained excellent results even though the plaintiff did not prevail on every contention. Spulak, 894 F.2d at 1160 (citing Hensley, 461 U.S. at 435). In light of Hensley and Spulak, we find no abuse of discretion in the

district court's award of attorney's fees for time spent pursuing the claim that discrimination was willful.

Defendants also challenge the award of attorney's fees for time spent working with a statistical expert who did not testify at trial. Under Hensley and Ramos, the question for the district court was whether such time was reasonably expended in pursuit of Mr. Whalen's case. We find no abuse of discretion in the district court's finding that time spent researching a statistical argument in the instant case was reasonable, and we affirm the award of attorney's fees in this regard.

Defendants object, finally, to an award covering expenses for photocopying and computer research, complaining that the expenses are not adequately identified. Defendants have not directly attacked the affidavits of Mr. Whalen's counsel certifying the reasonableness and necessity of the charges. Neither have defendants cited legal authority for requiring more specificity in identifying expenses. We find defendants' bald assertion that expenses were inadequately identified to be unpersuasive. See Shorter v. Valley Bank & Trust Co., 678 F. Supp. 714, 727 (N.D. Ill. 1988) (court declined to require that photocopying invoices identify each document copied where all invoices were identified to lawsuit and total amount was not excessive). We hold that the district court did not abuse its discretion in awarding these expenses.

For the foregoing reasons, we AFFIRM the district court decisions.

APPENDIX - B

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JOHN W. WHALEN, Plaintiff - Appellee, v. UNIT RIG, INC., a Delaware Corporation; TEREX CORPORATION, a Delaware Corporation; MRL ACQUISITION CORPORATION, a Delaware Corporation, Defendants - Appellants.	)	No. 91-5069

ORDER ON PETITION FOR REHEARING

Before McKAY, Chief Judge, McWILLIAMS, Circuit Judge, and EISELE, District Judge.[8]

On Petition for Rehearing, Appellants properly point

---

[8]Honorable G. Thomas Eisele, Senior District Judge, United States District Court for the Eastern District of Arkansas, sitting by designation.

out that it in fact preserved the issue of the adequacy of plaintiffs' filing with the Oklahoma Human Rights Commission (OHRC). Thus, this Court erroneously refused to consider the issue.

The Court has reviewed this issue as briefed, together with the record and the trial court's order of April 17, 1990, denying defendants' Motion for Summary Judgment on that issue. We conclude that the trial court was correct in its analysis and concluion contained in its Order on pages one through seven. We therefore conclude that our initial affirmance Of the Judgment was corect. As herein modified, our opinion and order is affirmed on rehearing.

Entered for the Court

Monroe G. McKay
Chief Judge

APPENDIX - C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN W. WHALEN	)	
	)	
Plaintiff,	)	
	)	
vs.	)	88-C-1667-B
	)	
URE CO., a Texas corporation, formerly UNIT RIG AND EQUIPMENT COMPANY, a Texas corporation; UNIT RIG, INC., a Delaware corporation; MRL ACQUISITION CORP., a Delaware corporation; and TEREX CORPORATION, a Delaware corporation,	)	
	)	
Defendants.	)	

ORDER

This matter comes on for consideration upon the Motion for Summary Judgment filed by the Defendants Unit Rig, Inc. (URI), MRL Acquisition Corp.(MRL), and Terex Corporation (TEREX).

This is an age discrimination suit brought by .the Plaintiff, John W. Whalen, for alleged violations of the Age Discrimination Act of 1967, as amended, 29 U.S.C. §§621-34(ADEA), based upon a "refusal to hire" charge. Plaintiff's previous employer, URE CO., formerly Unit Rig and

Equipment Company (URE), has been dismissed as a Defendant herein by joint stipulation. Plaintiff had alleged he was wrongfully discharged by URE on July 14, 1988.

Plaintiff was employed by URE from June 8, 1977, until July 14, 1988. At the time of his discharge Plaintiff was 63 years of age. Plaintiff had been Controller of URE since July, 1985.

During the 1980s URE experienced difficulties sufficient to require layoffs and cause the company to seek Chapter 11 Bankruptcy relief (1985). From a peak of 2000 employees, URE had reduced to less than 500. A 10% wage decrease was invoked in 1988 as an alternative to further reduction of the work force.

During 1987-88 URE's management sought prospective purchasers including URE's management personnel (among which was Plaintiff). Defendant Terex became interested in URE and ultimately acquired the assets of URE (with the assistance of Defendant MRL), naming the new entity Unit Rig, Inc. (URI, a defendant herein).

To effect the acquisition, all of the employees of URE were discharged on July 14, 1988, and all but 46 were hired by the new company, URI, on July 15. Plaintiff was not among the rehired[9], hence the "refusal to hire" charge.

Two significant employee lists were prepared before the acquisition, a Reduction in Force list (RIF list) and a Paymaster list. Although entitled "paymaster by service date", the Paymaster list was organized by age, listing the employees by their ages, the oldest being at the top of the list[10]. The RIF list was organized by departments, although the ages of the employees were shown thereon. 44 employees were on the RIF list. The Paymaster (Age) list contained the names of 155 employees.

It is evident that Plaintiff either prepared the RIF list

---

[9]Plaintiff, however, served, for a specified fee, as a consultant to URI for approximately 60 days immediately after July 15, 1988.

[10]In fact, the Paymaster list title had been corrected by ink to read "paymaster by age date".

or had significant input in its preparation. It is disputed why the RIF list was prepared[11], and even when it was prepare[12]. While the RIF list, as originally prepared contained 44 names (one name, J. Kotekar, was later stricken), three more names, including Plaintiff's[13], were penciled additions. Of this total of 46 names, 28 appeared on the Paymaster-Age list.[14] All but two, Thomas Laven, age 63 (noted as "retired") and P. Laucher, age 39, were not hired by the new company. Plaintiff was in the group not hired by the new company, URI.

Defendants' Motion for Summary Judgment relates to two broad issues, either urged by Defendants as dispositive of this matter. The first issue is: Plaintiff has failed, procedurally, to take the requisite steps in his alleged failure to file a proper and timely "charge" with or before the Equal Employment Opportunity Commission (EEOC) or its state level correlative where applicable, in this case the Oklahoma Human Rights Commission (OHRC).

Defendants admit Plaintiff filed, on October 20, 1989, "Intake Questionnaires" for each of the Defendant companies but allege Plaintiff misstated his complaint therein as to the present Defendants due to his allegation he was laid-off or discharged because of his age. Defendants allege this could only be true, if at all, in relation to Plaintiff's former employer, URE; that the cause of action pled in the complaint alleges "failure to hire"; therefore no EEOC or

---

[11]There is conflicting evidence whether it was prepared only in connection with possible acquisitions, or was prepared in anticipation of a reduction in force regardless of acquisition by another entity.

[12]It is undisputed one RIF list was prepared on April 18, 1988; however, Defendants' undisputed fact No. 24 recites the URE's top management, including Plaintiff, compiled a list on July 11, 1988, consisting of 44 employees who should be discharged under a reduction of force. It does not appear there were two different RIF lists.

[13]Walter Jackson, age 59, Vice-President of Finance, and K.L. Zilm, age 56, Vice-President of Human Resources.

[14]The other 18 employees being NE (non-exempt) employees and not listed on the Paymaster-Age list).

OHRC charge was ever properly made as to the present Defendants. Defendants further admit Plaintiff filed, on October 20, an Age Complaint Affidavit,[15] which advised Plaintiff intended to file suit after the required wait of 60 days. 29 U.S.C.§626(d). Plaintiff also filed with OHRC on that date a "layoff" statement.

On October 31, 1988, Plaintiff's attorney, Eric P. Nelson, wrote Floyd Wingo of the OHRC confirming an earlier telephone conversation that OHRC would only pursue the claim as against URE; that such decision was made at the sole discretion of OHRC and was neither requested nor agreed to by Plaintiff. Plaintiff filed the instant action on December 30, 1988.

The following appears in C. Richey, Manual on Employment Discrimination Law and Civil Rights Actions in the Federal Courts (Federal Judicial Center Jan. 1988 ed.)

> Although there are no formal charge-filing procedures, an employee may not commence suit until he/she has filed a charge alleging unlawful discrimination with the EEOC. 29 U.S.C.§626(d), as amended in 1978. The statute's use of the word "charge" is intended as a liberalization of the "notification of intent to sue" mandated by the original ADEA. The "charge" requirement should be satisfied by the filing of a written statement identifying the potential defendant and generally describing the allegedly discriminatory action. H.R. Rep. No. 950, 95th Cong., 2d Sess. 12 (1978) (conference report). The basic purpose of the charge is to provide the EEOC with sufficient information so that it may notify prospective defendants through informal methods of conciliation.

---

[15] In the affidavit Plaintiff names the present Defendants URI, MRL and TEREX as acting in concert with URE to unlawfully terminate his employment on the basis of his age.

The issue of whether a charge meets the statutory requirement is not unique. See, e.g. Michelson v. Exxon Research & Eng'g Co., 808 F.2d 1005 (3d Cir. 1987), holding that a charge must at least be written. See, also Greene v. Whirlpool Corp., 708 F.2d, 128 (4th Cir. 1983), cert. den. 464 U.S. 1042 (1984), holding that an employee's oral notice is insufficient. The legislative history of ADEA states the charge requirement is not jurisdictional.[16] Id. It therefore is subject to equitable tolling, where factually applicable. Nielsen v. Western Elec. Co., 603 F.2d 741 (8th Cir. 1979). ADEA, being remedial in nature, should be liberally construed. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 765 (1979).

Defendants heavily rely upon the proposition that Plaintiff's filings with the OHRC spoke to being discharged or "laid-off" because of age discrimination, rather than the present Complaint language of "failure to hire". Based upon the limited information provided in the Age Complaint Intake Questionnaires, the OHRC apparently chose to, on Plaintiff's behalf, pursue the matter only against URE. Had the OHRC[17] had before it the record now before the Court, it would or could have understood that Plaintiff's grievance was not a simple discharge-because-of-age case; it was more complex because of the Defendants' concerted arrangement to fire all the URE employees and hire back only those of their choosing. If this arrangement contained within it age discrimination it could, the Court concludes, be actionable under ADEA if adequately proven to the fact finder.

The Court concludes, under the unusual

---

[16]One decision, however, has held the court is without jurisdiction when a charge has not been filed. Bengochea v. Norcross, inc., 464 F. Supp. 709 (E.D. Pa. 1979).

[17]The Court concludes the OHRC could have perceived the inherent complexity of Plaintiff's complaint by statements in the Age Complainant Affidavit that "these entities acted in concert to unlawfully terminate my employment on the basis of my age."

circumstances of the acquisition of Plaintiff's former employer, URE[18], that the filings made by Plaintiff with the OHRC were sufficient to constitute a "charge" within the meaning of 29 U.S.C. §626(d). The Court further concludes that the agency had sufficient information, had it so chosen, to notify the Defendants of Plaintiff's complaint. Plaintiff's Age Complaint Affidavit, plus his attorney's letter of October 31, 1988, made it more than clear that he intended to pursue his claims against these entities notwithstanding that OHRC was only pursuing the claim against URE. Therefore, Defendants' Motion for Summary Judgment, as to the improper or untimely filing of a charge with EEOC or its state counter-part as a prerequisite to filing the instant action should be and the same is hereby DENIED.

The Court next considers Defendants' second issue, a contention they are, under the undisputed facts herein, entitled to summary judgment as a matter of law because no prima facie age discrimination has been shown.

---

[18]Defendants' tongue-in-cheek proposition that Plaintiff never applied for a job with the new company is disingenuous in light of the deposition testimony of the new entity's new president, Frank Hill, as follows:

"Q. So, how did these folks, for example, the chief accountant that we just talked about, how did Mr. Campbell know that he had a job on July 15?

A. (by Frank Hill) They were told that if you weren't getting severance pay you would report to work, as near as I can determine what was told to them.

Q. So, if you're not -- unless you're told to the contrary, you ought to be here the next day ready to work; right? Pardon me?

A. Yes, that's correct.

Q. So there was no need for anybody to apply for employment if they wanted employment with URI, was there?

A. No need. No need, right."

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

The Court must consider the significance vel non of the RIF list and the Paymaster-Age list, and what significant inferences a fact finder might realize therefrom. Of the top eight names (oldest) on the Paymaster-Age list, six were not re-hired (lowered to five when Laven, age 63, was retained under a designation of "retired"). Also, from the top 1/3rd of the Paymaster-Age list, 12 were fired while only 5 were fired from the bottom 1/3rd (youngest) of the list.

The Court concludes the RIF list use and the Paymaster-Age list use, although not essentially disputed, are capable of conflicting inferences by a fact finder vis-a-vis indicia of age discrimination. The Court is not unaware of the testimony of new URI president Frank Hill that he,

solely, made the determination that Plaintiff's job be eliminated, and that the decision was made without regard to Plaintiff's capabilities or competence. Yet the testimony[19] reveals a conflict whether Frank Hill asked for the Paymaster-Age list and whether Frank Hill said he was going to get a new controller, "a young one"[20]. It is undisputed that William Schein, a 29 year old, with no previous experience as a Controller, was hired within several weeks of Plaintiff's departure to fill Plaintiff's previous position as Controller. Defendants contend John Liechty was hired to replace Plaintiff but that, in less than three weeks, it was determined Liechty needed help handling the financial affairs of URI; thus Schein was hired. The Court concludes these events and their contrasting versions, demonstrate factual disputes, or at least possible conflicting inferences from undisputed facts, to preclude summary judgment. Charbonnages de France v. Smith, 597 F.2d 406 (4th Cir. 1979).

The Court is aware that age discrimination cases often rely on an indirect proof scheme as established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-04, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981). In Cockrell v. Boise Cascade Co., 781 F.2d 173 (10th Cir. 1986), the Court noted the fourth prima facie element[21] had been modified by allowing a Plaintiff to show through circumstantial evidence that he/she was treated less favorably than younger employees during the reduction-in-force. (citing Branson v. Price River Coal Co., 853 F.2d 768 (10th Cir. 1988).

---

[19]Deposition of Walter E. Jackson, p. 93, attachment to Plaintiff's brief.

[20]Deposition of Walter E. Jackson, p. 209, attached to Plaintiff's brief.

[21]Requiring the Plaintiff to produce evidence, circumstantial or direct, from which a fact finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.

This Court, in an earlier case[22], entered judgment n.o.v. in favor of an employer-defendant. While the case was not a failure-to-hire case, it has similarities to the present case.[23] On appeal, the Court of Appeals held that the employees-plaintiffs failed to establish that the employer's reason for terminating them was a pretext for age discrimination, as the testimony of the other employees indicated that the employer was attempting to retain those employees with the broadest range of skills and abilities to shepherd the company through very difficult economic times. Lucas v. Dover Corp., Norris Div., supra. The present posture of the instant case distinguishes it from Lucas. Today, the Court is determining whether a genuine dispute exists as to any material fact. The Court concludes the Defendants' Motion for Summary Judgment, on the issue that no genuine facts of a material nature exist and Defendants are entitled to judgment as a matter of law, should be and the same is hereby DENIED. As in Lucas v. Dover Corp., Norris Div., supra, the Court will reexamine the matter at the time of trial.

IT IS SO ORDERED this ___ day of _____, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

---

[22]Lucas v. dover corp., Norris Div., 857 F.2d 1397 (10th Cir. 1988).

[23]Of the 18 supervisory employees terminated, 11 were under the age of 40 while only seven were over 40.

APPENDIX - D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN W. WHALEN,	)
Plaintiff,	)
vs.	)Case No. 88-C-1667-B
URE CO., a Texas corporation, formerly UNIT RIG AND EQUIPMENT COMPANY, a Texas corporation; UNIT RIG INC., a Delaware corporation; MRL ACQUISITION CORP., a Delaware corporation; and TEREX CORPORATION, a Delaware corporation,	)
Defendants.	)

JUDGMENT

In accordanee with the jury verdict rendered on December 12, 1990, Judgment is hereby entered in favor of Plaintiff, John W. Whalen and against the Defendants, UNIT RIG INC., MRL ACQUISITION CORP., and TEREX CORPORATION, in the amount of $106,766.95, plus post-judgment interest at the rate of 7.28% (28 U.S.C. § 1961) from December 13, 1990, until said Judgment is paid. Costs are assessed against the Defendants, if timely applied for under Local Rule 6. Attorney fees, if appropriate, may be requested if timely applied for under Local Rule 6.

DATED this 13th day of December, 1990.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE